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ABSTRACT

This booklet is designed to help school board members understand New Jersey's public employee relations law and to serve as a useful guide to the operations of the New Jersey Public Employment Relations Commission. Individual chapters focus in turn on the Public Employment Relations Commission, unfair labor practices, the scope of collective negotiations proceedings, impasse procedures, representation proceedings, and injunctive relief. The appendix contains the complete text of the New Jersey Employer-Employee Relations Act. (JG)

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WHAT EVERY SCHOOL BOARD MEMBER SHOULD KNOW ABOUT:

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The Public Employment Relations Law

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EA 009 271

THE PUBLIC EMPLOYMENT RELATIONS LAW

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Foreword

The legal obligations imposed on public employers appear with increasing frequency. Even a quick review of some of the laws enacted can convince you that something must be missing in *your* education or that there exists a group of people intent upon confusing all of us. Volume 6 of the *What Every School Board Member Should Know* series is designed to help you better understand New Jersey's public employment labor relations law.

The meaning of unfair practices, scope of negotiations, impasse procedures, representation matters and injunction proceedings are included. How to bring a charge, what happens at a hearing – practical information in everyday language is contained here.

No work on such a new and dynamic law can be unaffected by changing legal decisions. Absent a wholesale modification in the statutes, however, *What Every Board Member Should Know About the Public Employment Relations Law,* should serve as a useful guide to the operations of the Public Employment Relations Commission for some time to come.

The New Jersey School Boards Association will continue to monitor and influence decision-making in this vital area. New developments, as always, will be communicated immediately to school boards.

If you have a problem in labor relations and the answer is not here, contact us. We hope this volume is useful to each local board of education in establishing and maintaining good employer-employee relations. Perhaps then, local boards of education and their administrative staffs can devote their maximum energies to their primary task – providing a thorough and efficient system of education for all the children in their charge.

Mark W. Hurwitz, Executive Director
New Jersey School Boards Association

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Chapter I

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

The State agency responsible for enforcing Chapter 123 is the Public Employment Relations Commission (PERC).

PERC is composed of seven appointed Commission members and about twenty-five full-time staff members.

COMMISSION MEMBERS

Under Chapter 123, the Commission consists of seven members appointed by the Governor with the advice and consent of the Senate. Two members represent public employers, two represent unions and three represent the public. Terms are for three years.[1]

COMMISSION CHAIRMAN

One of the three public members acts as the Chairman of PERC and is the only full-time member. The Chairman is the day-to-day operating officer of PERC. The incumbent is responsible for personnel matters, overall staff assignment and, very often, is delegated decision-making powers by the full Commission.

THE COMMISSION'S DUTIES

The Commission is the decision-making body responsible for impasse procedures, unfair practice cases, scope of negotiations matters and questions concerning whether a particular union represents a majority of employees. The Commission makes rules and regulations in these areas and issues decisions on the last three topics.

The responsibilities of the Commission are discussed in each of the following chapters.

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[1] At the time of writing, consideration was being given to the establishment of an all-neutral Commission.

The Commission meets from time to time to consider rules and regulations and to issue decisions. Like almost all other government agencies, the Commission members generally act upon recommendations made by the Commission's full-time staff, which has researched and analyzed the issue.

DIVISION OF STAFF RESPONSIBILITIES

The staff is supervised in various areas by the Director of Impasse Procedures and the Director of Unfair Practices and Representation. Questions of PERC actions in these areas should be asked of the respective Director. PERC also employs a General Counsel and Deputy General Counsel who are responsible to the Executive Director and provide on-going legal assistance.

HEARING OFFICERS

Currently three staff members are designated Hearing Officers to take testimony and issue recommendations in unfair practice matters. Any staff member, including Hearing Officers, may be assigned to act as a hearing officer on representation questions.

OFFICES[2]

Trenton: John Fitch Plaza, Trenton, N.J. 08625—609-292-6780

Newark: 80 Mulberry Street, Newark, N.J. 07102—201-648-3425

AD HOC PERSONNEL

PERC employs individuals, on a per diem basis, to act as mediators, factfinders and arbitrators under the provisions of the law. PERC's Director of Impasse Procedures, together with the Executive Director, review the qualifications of neutrals to appear on PERC's lists. Almost all these *ad hoc* neutrals have extensive experience in mediation, factfinding and arbitration and all

[2] Most PERC staff members work out of the Trenton office. PERC does maintain an office in Newark. Papers to be filed to PERC should be sent to the Trenton address.

appear on approved lists elsewhere. Most are certified arbitrators on the American Arbitration Association rolls; many are used as neutrals in Pennsylvania and New York by those states' public employment boards.

Chapter II

UNFAIR PRACTICES

1. BACKGROUND

Section 7 of the Public Laws of 1968, Chapter 303, stated the general obligations of public employers and employee organizations in the area of labor relations.[1] However, in a decision handed down by the New Jersey Supreme Court in 1970, it was determined that PERC did not have the authority to remedy violations which resulted in unfair practice charges. Chapter 123, passed in 1974, was in large part designed to give to the Commission that authority. The unfair practices listed in the law are not very different from those under other labor laws, including the National Labor Relations Act which has covered most United States workers for forty years.

2. WHAT YOU SHOULD KNOW ABOUT UNFAIR PRACTICE CHARGES

Most charges are filed by unions against employers. Most charges (almost 90% under the National Labor Relations Act) are either dismissed or withdrawn. Of the remaining 10% to 12% that result in a hearing, a significant percentage result in a dismissal of the charge. It should be apparent, then, that many charges are filed for tactical purposes. The charging party may want to convince its members that it is doing a good job for them,

[1] These obligations are the same contained in Chapter 123 discussed later in this section.

convince the community that the other party is the "bad guy" or persuade the other party to change its position to avoid the consequences of an unfair practice charge. The response to such charges should be reasoned. Over-reaction to a meritless charge will not serve you well. If the processing of the charge by the board has been delegated to an attorney or labor relations professional, let them worry about it. If you are convinced that your course of action is correct, proceed with it. If the other side seems to be violating the law, consider filing a charge of your own.

3. THE LAW

The general obligations imposed by Chapter 123 are as follows:

1) Public employees have the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.

2) Employee organizations (unions) designated by a majority of employees in an appropriate unit shall be the exclusive representative for collective negotiation concerning the terms and conditions of employment of those employees.

3) A majority representative of employees (union) is entitled to act for and to negotiate agreements covering all employees in the unit.

4) A majority representative bargaining for employees (union) is responsible for representing the interest of all employees without discrimination and without regard to union membership.

5) Unions and public employers must meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment of employees.

6) When a union and a public employer reach agreement on terms and conditions of employment, those terms and conditions must be placed into a signed contract between the parties.

4. THE MEANING OF THE LAW — UNFAIR PRACTICES OF EMPLOYERS

1) INTERFERING WITH, RESTRAINING OR COERCING EMPLOYEES IN THE EXERCISE OF THE RIGHTS GUARANTEED TO THEM BY THIS ACT.

This section is designed to prohibit an employer from interfering with employee rights. Because of the general and encompassing nature of this section, PERC usually finds a violation of this specific section when an employer violates any other section of the law. For instance, if an employer violates section three by seeking to reward or punish employees for their membership and activities in a union or their refusal to join and support that union, PERC will then find that the employer violates section one which guarantees the employee all rights within the Act.

There are also employer actions which may be direct violations of the section. For example:

- Threatening employees with discipline because they support or oppose a union.
- Promising employees better wages or fringe benefits if they vote against union representation.
- Questioning employees concerning why they are not members of the union.
- Giving some bargaining unit employees benefits because they are members of the union, while denying those benefits to those bargaining unit employees who are not union members.

2) DOMINATING OR INTERFERING WITH THE FORMATION, EXISTENCE OR ADMINISTRATION OF ANY EMPLOYEE ORGANIZATION.

The object of this section is to insure that employee organizations representing employees are not controlled or assisted by the employer.

Domination of a labor organization has been held when:

- An employer sets up a union, funds it, makes its decisions.
- An employer controls internal actions of a union, such as election of officers.

Employer *interference* occurs when an employer:

- Attempts to force employees to join a specific labor organization.
- Asks newly hired personnel to fill out union membership and dues deduction cards.
- Pays sums of money to union officials or union members because of their membership in the union.
- Allows one union to use the employer's facilities to attract new members during an organizational campaign while denying that right to other unions.

The exact violations of this section, like all others, must be defined by PERC.

3) DISCRIMINATING IN REGARD TO HIRE OR TENURE OF EMPLOYMENT OR ANY TERM OR CONDITION OF EMPLOYMENT TO ENCOURAGE OR DISCOURAGE EMPLOYEES IN THE EXERCISE OF THE RIGHTS GUARANTEED TO THEM BY THIS ACT.

Simply stated, an employer may not take an action in order to coerce employees into supporting a union or to coerce them to withhold such support. It has been held under other labor laws that this section *does not limit* the employer's right to take normal actions concerning layoff, transfer, hiring, promoting and other managerial decisions. The violation of this section occurs when the employer seeks to reward or punish employees for their membership and activities in a union or their refusal to join and support that union. Examples of violations of this section are:

- Refusing to hire a potential employee because that person was active in a union in his or her former employment.
- Only hiring people who were members of a specific union in their past employment.
- Discharging, disciplining, or withholding benefits from an employee because he or she is or is not a member of a specific union.
- When layoffs are necessary, choosing personnel to be laid off because they are active union members.

4) DISCHARGING OR OTHERWISE DISCRIMINATING AGAINST ANY EMPLOYEE BECAUSE HE HAS SIGNED OR FILED AN AFFIDAVIT, PETITION OR COMPLAINT OR GIVEN ANY INFORMATION OR TESTIMONY UNDER THIS ACT.

This section is intended to protect employees who file charges with PERC or attempt to otherwise use the procedures of the law to gain their rights. Some violations of this section may include:

- Disciplining an employee because he or she filed a charge against an employer or a union.
- Denying promotions to employees because they testified during a PERC hearing.

5) REFUSING TO NEGOTIATE IN GOOD FAITH WITH A MAJORITY REPRESENTATIVE OF EMPLOYEES.

By far, the unfair practice section raising the most complex issues involves the meaning of *good faith bargaining*. Many decisions have been issued in this area under Federal laws and under the laws of other states.[2]

An employer must meet with a majority union to negotiate all matters concerning terms and conditions of employment. "Terms and conditions of employment" has traditionally meant salaries, fringe benefits and hours. It also has been extended to include other "working conditions." There is controversy concerning the definition of this phrase. Chapter 123 directs PERC to make determinations of whether certain issues are negotiable. That is the way in which "working conditions" will be defined. The method the Commission uses is called Scope of Negotiations Proceedings. They are explained elsewhere in this book.

Some obvious violations of this section would occur if:

- An employer refused to ever meet with a legally recognized union to discuss terms and conditions of employment.

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[2] For a general definition of "good faith bargaining," see **Negotiations 78**, pp. 5-6, or **Negotiations News and School Law Reporter**, March, 1975, pp. 2-3.

• An employer refused to provide insurance, for example, when it had been agreed upon in a collective bargaining agreement.

• An employer attempted to force the union not to use a specific person as its representative in negotiations. (Employers may, in certain circumstances, object to a supervisor representing a non-supervisory group of employees)

• An employer grants a wage increase to employees without negotiating with the majority union.

At times, a union will file a charge contending that an employer's conduct during bargaining violates the law despite the fact that the employer has committed no obvious violation (such as a refusal to meet). PERC has followed the course set down by other agencies in this area. In a decision involving the state colleges of New Jersey,[3] PERC said it would consider the entire pattern of bargaining, what is usually called the "totality of conduct." Generally, no one position taken at the bargaining table can be the basis for finding a violation. Unless a bargaining position is itself a violation of law (for example, an employer's demand that only union members can file grievances) the position taken can only be an *indicator* of bad faith. If the employer makes proposals which are totally unacceptable on many issues and refuses to even consider alternatives, those positions, when considered together, *may* reveal a pattern of bad faith. Certainly, if an employer is violating Chapter 123 in other respects there will be greater suspicion about the bargaining positions taken by it. The discipline of union members to discourage union activity, for example, gives more weight to a union's charge that the employer has acted in bad faith at the bargaining table. However, even when away-from-the-table violations have occurred, it does not necessarily follow that the employer is engaging in bad faith bargaining.

It has been said often that *the duty to bargain does not impose the duty to agree.* An employer is not forbidden from seeking or reaching an agreement beneficial to its interests. The employer may be insistent during the

[3] **State of New Jersey and Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO,** PERC E.D. No. 79, August 14, 1975.

course of bargaining, it may focus on issues it believes to be important and it may require concessions in return for its agreement on items. This section of the law was not intended to strip the employer of its right to engage in hard bargaining. It was designed to protect the bargaining relationship and to provide a framework for meaningful bargaining.

One other topic of concern to school boards under this part of the law is the question of whether a negotiating committee can bind a board to a contract. Under a recent decision,[4] PERC has held that a negotiating committee may, under certain circumstances, bind a board of education to a contract.

Boards should not bargain as a group. The process of bargaining is time-consuming and often frustrating. In many areas where boards are addressing a particular problem, a committee studies the situation and helps the entire board reach a responsible decision. The same practice can pertain to the negotiation process. But the committee should work closely with the full board and should only agree on contract terms which the board can accept. On the other hand, the committee should be able to make concessions and affect compromises without constant consultation with the full board. The committee should be ready to explain the proposed agreement to the board and should be prepared to defend that agreement. There is serious question, however, whether a board can fully delegate its final responsibilities in this area to a committee. A strong argument can be made that such delegation is not within the authority of the board under State law. Aside from the question of whether or not a board may voluntarily delegate such authority, you should keep in mind that you cannot be *forced* to delegate final authority to the bargaining team. Therefore, if the board does not want the bargaining committee to commit it finally to a contract, that position should be made clear to the union prior to beginning negotiations. Just as

[4] **Bergenfield Board of Education and Bergenfield Education Association,** PERC No. 90, July 21, 1975. In this case, a majority of board members was present for most negotiating sessions, the board had not informed the union prior to bargaining that it retained the final authority to approve or reject any agreement and the board members signed a "Final Understanding" on the last night of bargaining, rather that the traditional "Tentative Agreement."

unions have the right to submit proposed contracts to their members for ratification or rejection, so too should boards protect their right to accept or reject proposed contracts reached by their bargaining teams. You should also remember that the problem of rejected agreements can be substantially reduced by a high degree of communication between the full board and its team.[5]

To summarize, no other prohibited unfair practice is potentially as complex as is this one. Cases will very often present unique circumstances and it may take a great deal of time before standards are set on many of the issues that arise from this section.

6) REFUSING TO REDUCE A NEGOTIATED AGREEMENT TO WRITING.

This section makes it a violation for an employer to refuse to sign a contract it has reached with a majority union.

7) VIOLATING ANY OF THE RULES AND REGULATIONS ESTABLISHED BY THE COMMISSION.

To our knowledge no other state or Federal labor law holds that you commit an unfair practice when you violate a procedural rule of an agency. The following example indicates the potential effects of such a provision: PERC's Rules require an unfair practice charge to be signed. Under other labor laws, if the charge is not signed, it simply means that there is no charge. Under Chapter 123, forgetting to sign a charge could itself be an unfair practice! As you can see this section is very broad but it is suspected that it will not be applied.

5. THE MEANING OF THE LAW—UNFAIR PRACTICES OF EMPLOYEE ORGANIZATIONS

Employee organizations, their representatives or agents are prohibited from:

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[5] For a more in-depth discussion of collective negotiations techniques, see **What Every School Board Member Should Know About Collective Negotiations**, Dr. John Metzler, New Jersey School Boards Association, January, 1976.

1) INTERFERING WITH, RESTRAINING OR COERCING EMPLOYEES IN THE EXERCISE OF THE RIGHTS GUARANTEED TO THEM BY THIS ACT.

As the majority representative of employees, a union has an obligation to represent all members of the bargaining unit, not just union members. Unions are prohibited from threatening employees or from otherwise forcing them to take or not take certain actions. This Section is called the Duty of Fair Representation.

Examples of union violations of this section include:

- Refusing to process the grievance of an employee because he or she is not a member of the union.
- Discriminating against employees because of their membership in another labor organization.
- Coercing an employee because he or she opposes actions of the union's officers.
- Attempting to persuade or force an employer to dismiss or discipline employees because they are not members of the union.
- Accepting illegal assistance or domination by an employer.

2) INTERFERING WITH, RESTRAINING OR COERCING A PUBLIC EMPLOYER IN THE SELECTION OF HIS REPRESENTATIVE FOR THE PURPOSES OF NEGOTIATIONS OR THE ADJUSTMENT OF GRIEVANCES.

A union violates this section when:

- It refuses to bargain with a professional negotiator selected by the board.
- It attempts to deal directly with individual board members.

3) REFUSING TO NEGOTIATE IN GOOD FAITH WITH A PUBLIC EMPLOYER, IF THEY ARE THE MAJORITY REPRESENTATIVE OF EMPLOYEES IN AN APPROPRIATE UNIT CONCERNING TERMS OR CONDITIONS OF EMPLOYMENT OF EMPLOYEES IN THAT UNIT.

The union has an equal obligation to bargain in good faith. The union may violate the law if:

- It takes a "take it or leave it" attitude at the negotiating table.
- It refuses to negotiate concerning board proposals.

4) REFUSING TO REDUCE A NEGOTIATED AGREEMENT TO WRITING AND TO SIGN SUCH AGREEMENT; AND

5) VIOLATING ANY OF THE RULES AND REGULATIONS ESTABLISHED BY THE COMMISSION.[6]

6. REMEDIES

When PERC finds a violation of law, it may issue an order designed to remedy the unfair practice and prevent future illegal actions. The type of remedy ordered by PERC will differ from case to case depending upon the nature of the violation. For example, if an employer is found to have discharged an employee for his union activity, PERC can order the employer to reinstate the employee to his former position with full back pay. If a union illegally fined an employee, PERC could order that the fine be returned. The agency also may order the offending party to post an official notice which states that it has violated the law and that it is applying the remedy ordered by PERC.

When a certain violation does not lend itself to monetary payment or personnel action, PERC will simply issue a written order perhaps with a notice. Primarily, this will occur when either the employer or union has been found to have bargained in bad faith. In this case, PERC's order will state that the union or employer should refrain from violating the law and bargain in good faith in the future. This would also be contained in an official notice to be posted by the offending party. It has long been held by the courts in the United States that neither they nor agencies such as PERC may order one side or the other to make specific concessions during bargaining.

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[6] These last two sections are identical to those contained in the employer unfair practice portion of the law.

7. UNFAIR PRACTICE PROCEDURES

WHO MAY FILE A CHARGE?

Under the rules and regulations of the Commission, any public employer, public employee, public employee organization, or their representatives may file a charge with the Commission.

HOW IS A CHARGE FILED?

1. Charges may be filed by completing forms which can be obtained from the Commission's office.

2. The charge must be signed by the person filing the charge.

3. This charge must be sworn to before a person authorized in New Jersey to administer oaths, usually a Notary Public, or must contain the following statement:

I certify that the foregoing statments made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4. The charging party must include its full name, address and telephone number.

5. The charging party must include the full name, address and telephone number of the party against whom the charge is filed.

6. The charge must include a statement of which sections the charging party claims to have been violated and the facts upon which the charge is based.[7]

7. The charging party must file an original and four copies with the Commission. The charging party must also serve a copy on the party against whom the charge was filed and be able to prove that it did so. Normally, this can be done by mailing the charge by certified mail, return receipt requested.

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[7] Some practices are violations of two or more sections of Chapter 123. Employers and unions can both violate the law at the same time by actions they take jointly. For these reasons, boards considering filing a charge against a union should consider whether an action may violate other parts of the law. At the same time, boards must be careful, especially in contracts, not to agree with the union to violate the law.

WHAT HAPPENS TO A CHARGE?

A. PROCESSING

After the charge is filed, a member of the PERC staff will normally be assigned to process the case. This staff member may request each party to supply a written position on the charge and may also ask the parties to submit written legal briefs on the issues. Normally, the staff member will ask the parties to attend an exploratory conference to find out what the issues are in the case and to try to work out a settlement.

B. COMPLAINT OR DISMISSAL

If there is no settlement of the case and the Commission agrees that the allegations, if true, *may* constitute an unfair practice, the Commission will issue a *complaint* against the party charged with violating the law.

A complaint informs the parties which sections of the law are alleged to have been violated, when and where the hearing is to be held and who will act as the hearing officer. All this means is that there *might* be a violation of law and PERC will hold a hearing to determine this. Because the standards for issuance of a complaint are so liberal, its mere issuance gives no real indication of whether the respondent has violated the law.

If the Commission does not agree that the allegations may constitute a violation of the law, it will *dismiss* the charge. The case is then closed.

You should remember that PERC never *investigates* the unfair practice charges filed.

C. ANSWER TO COMPLAINT

The party who receives the complaint (the respondent) must file an *answer* within ten days. This answer admits, denies or explains each of the charging party's allegations. If these are not denied or explained, PERC considers them admitted. It is vital that the answer be prepared properly. Perhaps by now you would agree that it is wise to employ your board attorney or a labor relations consultant when faced with an unfair practice charge.

D. THE HEARING

A hearing examiner will hear the case. It is the responsibility of the charging party to prove its case. Neither PERC nor the hearing examiner has that responsibility. Either party may call witnesses who will testify under oath and may be cross-examined. Subpoenas may be issued to require individuals to testify or to produce records.

E. BRIEFS

Either party may file a brief after the hearing summarizing its positions and supporting them with legal citations.

F. HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

The hearing examiner then writes a report which states what he or she finds the facts to be and what action is recommended to be taken by the Commission based upon his or her reading of the law.

G. THE DECISION BY PERC

If one party or the other does not formally file *exceptions* to the report, the Commission will accept it as their own. (*Exceptions* are written objections to parts or all of a proposed decision by one party or the other) If either or both parties do file exceptions, briefs may be filed with PERC and the Commission will issue a decision. That decision may dismiss the entire charge, find some of the charge to be true or find all of the charge to be true. If PERC finds a violation of law, it will issue an order directing certain actions be taken by the respondent (see *Remedy* section earlier in this Chapter). As with other decisions of PERC, one party or the other may file an appeal with the courts of the State.

Chapter III

SCOPE OF COLLECTIVE NEGOTIATIONS PROCEEDINGS

1. BACKGROUND

The Act expressly gives PERC the authority to make determinations as to whether a specific matter in dispute between an employer and union is within the scope of collective negotiations. Previously, scope of negotiations determinations were made by the courts. One major drawback to the previous method of obtaining scope of negotiations determinations was that the courts would generally decline to hear a case unless the matter had already been negotiated and included in the contract and unless one of the parties to the contract was now refusing to comply with the agreement. This had a tendency to create a considerable amount of animosity between the employer and the employees. The amendments to the Act which expressly give PERC the authority to make scope of collective negotiations determinations has alleviated this problem to a considerable extent.

At present, when there is a dispute as to whether a matter is within the scope of collective negotiations, the parties, depending upon the circumstances, will proceed in one of the following ways:

If *contract negotiations* are in the process of being conducted and a proposal is made concerning a matter which the other party believes not to be a required subject of negotiations, there are two options open to the party receiving the proposal. That party may refuse to negotiate with respect to that matter until the other party receives a determination from PERC that the matter is, in fact, within the scope of collective negotiations. Alternatively, the party receiving a proposal concerning a matter which it feels is not a required matter for collective negotiations may, itself, file a petition for a scope of collective negotiations determination with PERC.

If an *existing contract* contains a matter which one party doubts is within the scope of collective negotiations and which is giving rise to a grievance under the contract, that party may file a scope of collective negotiations petition with PERC. If PERC determines that the matter is not within the scope of collective negotiations then, even though the matter is contained within the contract, it cannot be the basis for a grievance. For instance, if a contract inadvertently contains a matter which discriminates on the basis of sex, that matter is both illegal and beyond the scope of negotiations. The language would have to be struck from the contract and consequently could not be a basis for a grievance. As discussed elsewhere in this book, it is possible to obtain an injunction when a scope of collective negotiations determination of this type is sought.

By rule, PERC will determine whether a specific matter in dispute is a *required, permissive* or *illegal* subject for collective negotiations. A *required* subject for collective negotiations is one which must be negotiated if either party desires to do so (sometimes called *mandatory* subject). To refuse to negotiate a required subject is an unfair practice.[1] A *permissive* subject is one which may be negotiated only if *both* parties are willing to do so.[2] If one party does not want to negotiate on a permissive subject which the other party is urging it to negotiate about, it need not do so. In fact, to insist to the point of impasse to negotiate on a permissive subject when the other party resists the negotiations is an unfair practice. However, if both parties consent to negotiate a permissive subject and an agreement is reached on that matter, that agreement is valid and binding on all parties. A matter is an *illegal* subject when one party is prohibited from negotiating on that matter by the statutes or by the Constitution of the State of New Jersey. Even if both parties willingly negotiate an illegal matter, a resulting agreement on that matter is not enforceable.

Generally, according to PERC, *required* subjects for collective negotiations directly affect terms and condi-

[1] Remember that the obligation to negotiate is not the obligation to concede.

[2] There is no reference in the law to a "permissive" subject. It is possible that this finding will not be upheld by the Courts.

tions of employment while *permissive* subjects concern management prerogatives or major educational policy decisions which only indirectly affect terms and conditions of employment.[3] *Illegal* matters are those matters specifically excluded by statute or constitutional provision from the realm of collective negotiations.

Determinations by PERC as to whether a specific matter is a *required, permissive,* or *illegal* subject for collective negotiations are reviewable by the Appellate Division of the Superior Court.[4]

2. SCOPE OF NEGOTIATIONS PROCEDURES

HOW IS A SCOPE PETITION FILED?

A scope of collective negotiations proceeding is started by the filing of a scope of negotiations petition. This petition may be filed by any public employer or any recognized or certified majority representative.

Petitions for scope of negotiations determination must be in writing and signed, and must contain the following information:

(a) The full name, address and telephone number of the public employer;

(b) The full name, address and telephone number of the majority representative;

(c) A clear and concise statement of the matter or matters in dispute with respect to which a determination by PERC is being sought; and

(d) A statement that the dispute has arisen:

(1) during the course of collective negotiations, and that one party seeks to negotiate with respect to a matter or matters which the other party contends is not a required subject for collective negotiations; or

(2) with respect to the negotiability of a matter or matters sought to be processed pursuant to a collectively negotiated grievance proce-

[3] Topics which PERC has ruled to be "permissive" in education include curriculum, budget formulation, expansion of facilities and school calendar.

[4] As of the publication date, the Supreme Court of New Jersey had not yet issued decisions under Chapter 123. As noted earlier, PERC's holdings in this area might not be agreed with by the Court.

dure;[5] or

(3) other than in (1) or (2) above, with an explanation of the circumstances.

3. WHAT HAPPENS TO A PETITION?

A. BRIEFS

Within seven days of filing a petition for a scope of negotiations determination, the party who filed the petition must file a brief supporting its petition. The other party then has fourteen days to file an answering brief and the original party then has five days to file a reply brief.

B. THE HEARING

At the time when a party files its first brief, it may request a hearing. This request must set forth in detail the factual issues on which the party is seeking the hearing. If a party does not request a hearing when it files its original brief, the hearing is waived.

A hearing examiner will hear the case. Either party may produce witnesses and exhibits.

C. HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

The hearing examiner then writes a report which states what he or she finds the facts to be and what action is recommended to be taken by the Commission based upon his or her reading of the law.

D. WHAT HAPPENS WHEN THERE IS NO HEARING?

As noted above, the parties may waive a hearing and rely on briefs filed to the Commission.

E. THE DECISION BY PERC

The Commission reviews the positions of the parties, the briefs, and, if there has been a hearing, the testimony

[5] This means that the union has filed a grievance over a matter you believe is not negotiable under the law.

of witnesses, exhibits and written comments on the hearing examiner's report (these comments are called "exceptions").[6] The Commission then issues a decision containing its findings of fact and law including a determination of whether the matter is a *required, permissive* or *illegal subject.*[7]

Chapter IV

IMPASSE PROCEDURES

1. BACKGROUND

Chapter 123 provides a mandatory impasse procedure which is used in the event an agreement over the terms of a successor contract has not been reached. Since public employees within the State of New Jersey do not have the right to strike, the legislature determined that a suitable alternative was needed for the resolution of any impasse which might occur during the process of collective negotiations. In so doing the following was enacted into law:

> *Whenever negotiations between a public employer and an exclusive representative concerning the terms and conditions of employment shall reach an impasse, the commission, shall, upon the request of either party, take such steps as it may deem expedient to effect a voluntary resolution of the impasse. In the event of a failure to resolve the impasse by mediation the commission is empowered to recommend or invoke factfinding with recommendation for settlement, the cost of which shall be borne by the commission.*

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[6] Either party may request the full Commission to hold a hearing on the case. The Commission must then allow the parties to appear before it to argue their case.

[7] If PERC finds the subject to be *required*, the employer must bargain in good faith concerning it. The failure to do so is an unfair practice. Decisions of the Commission are reviewable by the courts on appeal.

In almost every state where public sector collective negotiations has been sanctioned by law, mediation and some form of factfinding is used to assist the parties in reaching settlements. Chapter 123 provides for mediation (where the mediator tries to persuade the parties); and, factfinding (where the parties try to persuade the factfinder).

2. DEFINITIONS

Impasse – A point during negotiations where further meetings and conversation regarding the outstanding issues would prove fruitless.

Mediation – The intercession of a third party neutral who attempts to help the parties reach agreement after they have come to an impasse in their negotiations.

Factfinding – A formalized procedure used in those cases where no settlement is achieved during mediation. Through the parties' oral and written presentation and relevant supporting evidence, the factfinder examines the dispute and then issues written nonbinding recommendations for an agreement.

3. MEDIATION

WHEN IS MEDIATION INITIATED

In the event the parties have been unable to achieve an agreement through direct negotiations and an impasse has been reached, either party or both parties mutually can request the Public Employment Relations Commission in writing to appoint a mediator. The request can be made by completing the Notice of Impasse form or in the form of a letter describing the dispute. As a courtesy, a copy of the request should be forwarded to the other party.

HOW IS A MEDIATOR APPOINTED?

After receiving the request and making an initial determination that mediation is not being resorted to prematurely, PERC will appoint a mediator to the dispute. The neutral appointed (the mediator) will either be a permanent staff member of the Commission, or a

member of the *ad hoc* panel of mediators which the Commission maintains and pays on a per-diem basis. The parties are not given the privilege of selecting a mediator from a list. However, the parties may JOINTLY request the appointment of a particular mediator and PERC will, in most cases, grant such a request. Alternatively, if there is a particular mediator which one or the other party does not want appointed, that party can notify PERC and explain that the individual is not acceptable and request that he not be appointed.[1]

WHAT IS THE MEDIATOR'S FUNCTION?

The mediator is an advocate of the public interest who represents PERC. A MEDIATOR HAS NO AUTHORITY OR POWER TO MAKE RECOMMENDATIONS WHICH ARE BINDING ON EITHER PARTY. His function and role as a neutral government representative at the negotiating table is to assist and guide both parties toward arriving at a mutually acceptable compromise. He is not concerned with imposing upon the parties his own personal value judgements as to what he believes would be the most equitable agreement. It is the interests of the parties which is at stake and it is his role to encourage a settlement. The mediator is not concerned with fairness. His goal is simply to assist the parties to reach an agreement which is ACCEPTABLE to them.

If an agreement does not seem to be near during the process of mediation, the mediator may recommend to PERC that factfinding would be useful in resolving the continuing impasse. The recommendation will be in the form of a confidential mediator's report and the report will be one of the criteria used by PERC in considering whether or not the factfinding procedure should be initiated.

[1] The NJSBA's Labor Relations Department maintains informational files on mediators, factfinders and arbitrators. You are invited to call if you desire guidance in selection of a neutral.

DOES THE MEDIATOR MAINTAIN CONFIDENTIALITY?

A mediator may conduct separate or joint meetings as he deems necessary. Any information disclosed by a party to a mediator in the performance of his mediation function should not be divulged voluntarily or by compulsion.[2] For example, all the files, records, reports, documents or other papers of the mediator as they relate to a particular mediation case should be strictly confidential.

Once the mediator has been appointed, he will contact the spokesperson of each party by telephone and arrange for a time, date and place in which to begin mediation. Depending upon the mediator's style and flexibility, he will make a determination on whether the initial meeting will be separate or joint. Generally, in the absence of outright hostility, the initial meeting will be conducted with both sides in attendance. At that time each party will be asked to concisely review their respective positions on each outstanding issue. After the joint meeting, the mediator will meet separately with each party in order to explore the information obtained during the joint session in more depth. Since he is vested with absolutely no substantive decision-making power, there is little possibility of a party jeopardizing its negotiating position by taking the mediator into confidence. Under no circumstances, without specific authorization, should the mediator disclose to the other party a position taken in separate session.

WHO PAYS THE MEDIATOR?

PERC is responsible for reimbursing the mediator for the mediation services rendered.

4. FACTFINDING

HOW IS FACTFINDING INITIATED?

After the appointment of a mediator and upon his

[2] Neutrals do not always follow the guidelines laid down by the agencies for which they work. Most mediators do respect the confidentiality of the process. You should gauge this aspect of the mediator's performance before you divulge your critical positions.

report to the Commission that mediation has failed to achieve a settlement, PERC may invoke the next and more formal step of the impasse procedure, namely fact-finding. However, either party or both parties mutually may themselves request PERC to invoke factfinding. Like mediation, the request to invoke factfinding can be made by completing a form. This is entitled "Request for Invocating of Factfinding with Recommendation for Settlement." Alternatively, this can be done in a letter describing the dispute. Courtesy again dictates that a copy be forwarded to the other party.

HOW IS A FACTFINDER APPOINTED?

The appointment of a factfinder differs from the mediation appointment process in that the parties have the right, although somewhat limited, to select a fact-finder who is either a staff or *ad hoc* panel member.

After receipt of the mediator's report and/or one or both parties' request to begin factfinding procedures, PERC will forward an identical panel list of three fact-finders to the representatives of both parties. Each party then has three working days from the date on the panel list within which to select, rank and return their selections to PERC. The selection process involves crossing out no more than one name from the list and ranking the remaining two names in order of preference. PERC will appoint a factfinder consistent with the parties' selected order of preference. If the selections are not returned on time, PERC will appoint the factfinder who was given the highest rank by the other party.

As with mediation the parties may JOINTLY request the appointment of a particular factfinder including the neutral who was appointed as the mediator. PERC reserves the authority, however, to comply with or disregard the request. They will almost always honor such a request.

WHAT IS THE FACTFINDER'S FUNCTION?

In most cases, the initial functions of the factfinder

will be similar to those of a mediator. He will usually attempt to mediate in an effort to effect a voluntary settlement without "donning his robes" as factfinder. Of course, if the parties object to any additional mediation, factfinding will commence. The factfinder has the authority, after a hearing, to make written findings of fact and to recommend the terms of a settlement. A FACTFINDER'S REPORT AND RECOMMENDATIONS ARE ADVISORY AND NON-BINDING ON BOTH PARTIES.

The factfinder's recommendations represent what he perceives, based upon the hearing he conducts and his experience, as a predictable expectation of where the parties will reach agreement. Factfinding is not necessarily the finding of fact as much as it is the finding of acceptability. The "facts" may not warrant a specific recommendation but the factfinder may understand, through his time with the parties and his experience, that the recommendation might well be accepted. Of course, factfinders can and do risk ignoring critical facts. This leads to unacceptable recommendations.

WHAT IS A FACTFINDING HEARING?

The factfinder conducts a hearing in which he makes inquiry and investigation regarding the issues remaining in dispute. The factfinding hearing can be either formal or informal depending upon the style the individual factfinder employs. In either case, they are quasi-judicial in nature. The hearings cannot be conducted in public unless both parties and the factfinder agree to do so.

The authority of the factfinder during the hearing gives him the power to subpoena witnesses and compel their attendance, administer oaths and take sworn testimony or deposition of any person under oath, cross-examine witnesses, and require the production and examination of any governmental books, or other books or papers relating to any matter before him. Most factfinders conduct informal hearings and do not exercise these powers. The recommendations are, however, still

based on each party's expertise in persuading the factfinder to make his recommendations for settlement closer to its own position.[3]

WHAT CRITERIA DOES THE FACTFINDER USE?

Chapter 123 does not contain criteria or guidelines upon which the factfinder must base his recommendation. While specific statutory criteria is absent, factfinders have formulated their own criteria and tailored the application of the criteria to fit the negotiating relationship of the parties in dispute. In any event, it is significant that whatever criteria is used, the parties be aware of it and present their case utilizing the same guideline the factfinder does in making his recommendation. The more commonly used criteria would include:

(1) A comparison of the wages, hours and conditions of employment between the employees involved in the factfinding proceeding and employees with similar jobs in comparable communities. These comparisons may include the qualifications and duties of the employees, the length of the work week, additional fringe benefits and opportunities for promotion and transfer.

(2) The interests and welfare of the public and the financial ability/inability of the public employer to pay.

(3) Comparison of peculiarities in regard to other trades or professions, including (a) hazards of employment; (b) physical qualifications; (c) educational qualifications; (d) mental qualifications; (e) job training and skills; and, (f) length of the work year.

WHAT ARE FACTFINDER'S RECOMMENDATIONS?

If the impasse has not been resolved prior to or during the factfinding hearing, the factfinder will then issue his

[3] The factfinder is present to serve you. If you have testimony or documents to present, do not fail to do so simply because the factfinder states that they won't do any good. There are times when a party, especially one new to factfinding, can overwhelm the factfinder with repetitive or irrelevant information. In those cases the board should listen carefully to the factfinder and then judge for itself whether it should go ahead to present certain testimony and documents. The factfinder can be reminded that you have solid reasons for the positions you've taken during negotiations and that his experience in other districts may not be a true guide in your situation.

findings of fact and written non-binding recommendations for settlement as soon as possible after he has declared the hearing closed.

The recommendations will be submitted to the parties privately as well as to PERC. The parties must then meet within a period of five days in order that statements of position may be exchanged and an opportunity provided to reach agreement on the basis of the recommendations. EITHER PARTY MAY ACCEPT, REJECT OR MODIFY, EITHER IN FULL OR IN PART, THE RECOMMENDATIONS OF THE FACTFINDER.

In the event the impasse continues, PERC then has the authority to take whatever steps are deemed expedient to effect a settlement. In no case, however, does PERC have any authority or power to make recommendations or awards which are binding on both parties either before or after factfinding. The resolution of any impasse within the State of New Jersey can only be accomplished through VOLUNTARY AGREEMENT OF THE PARTIES. Negotiations are, therefore, considered to be "open-ended," with no compulsory final step in the impasse procedure.

WHO PAYS THE FACTFINDER?

The parties share equally the fee of the factfinder. Any individually incurred cost of factfinding by either parties is borne by that party. For example, if either or both parties want a stenographic record of the hearing, they will be required to pay for it.

5. PERC'S CONTINUING ROLE

Under the law, the Commission may take whatever steps it deems necessary to effect a settlement. In specific terms, the Commission is mandated to provide additional service and assistance in those situations where a strike might be imminent or ongoing. Although this assistance is not specifically called for in the law, it has been used on occasion. It has come to be known as "super-conciliation." Most times the "conciliator" is appointed after factfinding has been unsuccessful. For purposes of distinguishing

between mediation as the first step of the impasse procedure and PERC's continuing role, the neutral assigned during the latter stage of negotiations will be called a conciliator, although he carries out a mediation function.

The conciliator assigned by the Commission in crisis situations will normally be a neutral who has had a significant amount of high-powered mediation experience. Some of the procedural functions he will employ on his own motion or by request of either party are as follows. He may:

(1) Arrange for, hold, adjourn or reconvene a conference or conferences between the parties or one or more of their representatives.

(2) Invite the parties or their representatives to attend the conference and submit orally or in writing what each perceives as their respective differences on the outstanding issues.

(3) Initiate discussions concerning their differences.

(4) Assist in the drafting of any tentative agreement towards the final settlement of the existing or threatened dispute.

The conciliator will constantly put the responsibility for the solution and resolution of the impasse on the parties themselves. In addition to the procedural and communicative functions he might utilize, he will also be able to add a substantive dimension if the parties become receptive to any recommendations which he might submit for ultimate resolution.

6. PERC'S PANEL OF MEDIATORS AND FACTFINDERS

The Commission by law is required to include only those individuals it considers familiar with the field of public employee-management relations. In so doing, PERC employs approximately eight full-time staff personnel who mediate. As a matter of Commission policy, the staff mediators are never appointed as factfinders unless there is a mutual request from the parties for such appointment. Due to a total yearly caseload approaching 1,000 cases (mediation and factfinding), PERC must also employ other public employee-management relations

specialists on a per-diem *ad hoc* basis. These are the individuals who comprise PERC's Panel of Mediators and Factfinders and who service the majority of cases. At present there are approximately 75, most of whom are either college professors or attorneys.

The panel consists of neutrals broadly representative of the public who qualify and meet the Commission's standards and criteria of professional competence, impartiality and acceptability. Prospective applicants are reviewed prior to inclusion by the Commission on the basis of their education, experience, expertise and general reputation in the practice of labor-management relations.

One important consideration is whether an individual has been active in mediation, factfinding and arbitration under the jurisdiction of other agencies or organizations such as the American Arbitration Association, Federal Mediation and Conciliation Service, New Jersey State Board of Mediation, New York State Public Employment Relations Board, and Office of Collective Bargaining in New York City. Also a member may be affiliated with the Society of Professionals in Dispute Resolution (SPIDR) or the National Academy of Arbitrators, which is the most prestigious organization of neutrals in the country.

The Commission requires that as a condition of continuing membership, a member may not represent a public employer or public employee organization either directly or indirectly. Thus, a panel member may not directly negotiate or indirectly provide negotiation consulting services for either a school district or a labor union representing employees. Most of the panel members have some previous experience in grievance arbitration both in the private and public sector. Indeed, the majority of the panel have initially "gotten their feet wet" by some type of private sector labor-management position either as a neutral or advocate.

It is obvious that the most appropriate way to determine who the best neutral might be in any given situation is to have had a case with him or her. Without the actual experience however, a party should request PERC to supply his background material or give the names of some cases where he has served recently in order to contact

either of the principals involved to ascertain their experience. This is especially important to do when selecting a factfinder from PERC's list.

Chapter V

REPRESENTATION PROCEEDINGS

1. BACKGROUND

The raising and settling of issues and questions involved in representation proceedings is frequently the first area of formal contact between a public employer and a public employee organization.

Representation proceedings were first dealt with by the law passed in 1968. Except for a few changes in the definition of covered employees, Chapter 123 is identical to Chapter 303.

2. WHO IS ENTITLED TO BE REPRESENTED UNDER THE ACT?

The Act contains a very broad definition of employee. This definition appears to include all public employees other than certain named exceptions, called *exclusions*. Excluded employees may not be included in *any* bargaining unit. In addition, they have no right to engage in union activity and may be disciplined for doing so. For forty years, Federal and state governments have recognized that there must be some employees of an employer who can be kept free of union activity. Very obviously, if this were not the case, collective negotiations, already very fragile, would break down. Those exclusions which are relevant to a school district are *managerial executives* and *confidential employees*.

A. WHAT ARE MANAGERIAL EXECUTIVES?

In a school district, a "managerial executive" is defined to include only "the superintendent or other chief administrator, and the assistant superintendent of the district." Elsewhere in the Act, an employee who is the *equivalent* of the superintendent is included within the term "managerial executive." This term certainly includes administrative principals. It is widely assumed that, even though the phrase "assistant superintendent" is used, all assistant superintendents are excluded.

B. WHAT ARE CONFIDENTIAL EMPLOYEES?

"Confidential employees" are those employees whose job responsibilities and knowledge with respect to issues involved in collective negotiations in the district cause their membership in any appropriate negotiating unit to be incompatible with their official duties. In determining whether or not an employee is a "confidential employee" PERC will look to the actual work which that employee performs, not the employee's job description. The employee must actually have knowledge, gained through his or her on-the-job duties, of the issues involved in collective negotiations in that district to be considered a "confidential employee" by PERC. Secretaries to district personnel who actually negotiate or serve on a committee planning negotiations would be excluded if they had access to planning sessions, correspondence or conversations relating to collective negotiations. Individuals who have regular access to confidential files might also be excluded. Usually, this does not mean that those secretaries who, if they wished, could open a filing cabinet and peruse its contents, are confidential employees. Normally, the employee must have such access as an *on-going portion* of their work responsibilities.

C. WHAT ARE SUPERVISORS?

While *supervisors* are not excluded from being represented, they may be precluded from being repre-

sented by an organization which represents nonsupervisory personnel. The Act limits the term "supervisor" to someone who has "the power to hire, discharge, discipline, or to effectively recommend the same." Whether or not administrative personnel of the school district who conduct evaluations of teaching personnel have the power to effectively recommend discharge or discipline is presently being litigated before PERC. If PERC decides that such administrative personnel are supervisors, it will certainly limit that decision to those districts in which the board, in fact, does follow the recommendations which are presented to it. If the board has a past history of not following such recommendations, then the "effectively recommend" criteria will not be met. The Act provides for exceptions to the above rule which excludes supervisors from employee organizations that also represent nonsupervisors. Certain supervisors *may* nevertheless be represented by employee organizations that admit nonsupervisory personnel to membership. These exceptions arise "where *established practice, prior agreement* or *special circumstances,* dictate the contrary." For the *established practice* or *prior agreement* to be applicable, it must have been established or agreed to prior to July 1, 1968—the effective date of Chapter 303. *Special circumstances* are unlikely to be found. Very few school districts are included in this category.

3. WHAT IS EXCLUSIVE REPRESENTATION?

"Exclusive representation" is a right and an obligation which is granted to and imposed upon the employee representative who represents a majority of the employees within an appropriate unit.

The rights conferred by "exclusive representation" include the right to be the sole representative of all employees who are members of that unit. This right applies to both collective negotiations and the processing of grievances. When an exclusive representative exists, no other representative is permitted to engage in either collective negotiations or the processing of grievances.

The represenatative who is entitled to "exclusive representation" has the obligation to, fairly and without

discrimination with respect to an employee's membership in the employee organization, represent all the employee members of the unit in collective negotiations and grievance processing. The exclusive representative is guilty of an unfair practice if it discriminates against an individual or group of individuals because they are not members of a specific employee organization. However, the existence of a representative who is entitled to exclusive representation does not preclude the simultaneous existence of a minority organization.

Public officials can meet with minority representatives for the purpose of hearing the views and requests of the unit employees who are members of the minority representative organization so long as: (a) the majority representative is informed of the meeting; and, (b) modification of any terms and conditions of employment of the unit employees is solely made through negotiation with the majority representative. Additionally, the minority representative is not permitted to process grievances.

4. WHAT IS AN APPROPRIATE UNIT?

The majority representative is entitled to exclusive representation of all employees within the *"appropriate unit."* The "appropriate unit" consists of all employees whose conditions of employment are to be covered by the negotiations. The unit is based upon "community of interest" among the employees concerned. PERC places considerable emphasis upon the responsibilities of the public employer and if it finds the individual employees sufficiently connected with specific responsibilities of the public employer then it will most likely find a "community of interest." PERC and the courts have tried to avoid, where possible, fragmentation of units under one public employer.

5. HOW IS EXCLUSIVE REPRESENTATION OBTAINED?

To become an exclusive representative, the representative must represent a majority of all employees within the unit. The representative seeking majority

representative status may be an individual, group of individuals or an employee organization.

Once a representative claims to be a majority representative, there are two possible ways to become an exclusive representative. The alleged majority representative may be granted *recognition* as the exclusive representative of the unit employees by the public employer, if the public employer believes the alleged majority representative does, in fact, represent a majority of the unit employees. PERC can also hold a *certification* election to determine the actual majority representative of the employees in the unit.

A. RECOGNITION

When a public employer is presented with a request to *recognize* an employee organization as an exclusive representative, the public employer and the employee organization may resolve the matter without the intervention of PERC. However, the public employer is not obligated to grant recognition to a union, and may require the employee organization to request PERC to hold an election. As stated previously, engaging in collective negotiations with an employee organization which is a minority representative is an unfair practice.

In order to recognize an employee organization, the public employer must first satisfy itself that the employee representative has been freely chosen by a majority of the employees in the appropriate unit to be their representative for the purpose of collective negotiations and grievance processing. To satisfy this requirement, the public employer must conduct a suitable check of the *showing of interest* presented by the employee organization.

This suitable check requirement is met, in most cases, by examining authorization cards or petitions signed by a majority of the employees in the unit.[1] The signatures can be checked against endorsements on payroll checks. If the language on the authorization card is

[1] There is a danger in checking cards if the employer does not wish to recognize the union. In that case, the cards should be immediately returned to the union without examination.

confusing as to whether the employee is seeking an *election* for a majority representative or is designating that specific employee organization as his choice for majority representative, then the public employer probably is not justified in granting recognition to that employee organization. It is not required that an employee organization actually have a majority of the employees in the unit enrolled as *members* of the employee organization. All that is required is that a majority of the employees in the unit *desire to be represented* by the employee organization for the purpose of collective negotiations and grievances processing.

Next the public employer must have posted a conspicuous notice of its intention to grant recognition to the named employee organization without an election. The notice must be posted upon the bulletin boards where employee notices are normally posted and must be posted for at least ten consecutive days.

If the public employer has discussed or received a written communication from any other union within the preceeding year (even if the communication simply expressed the union's consideration of possible employee representation), the public employer must give that other union written notification at least 10 days prior to the grant of recognition. If the other union objects to the granting of recognition, it can file a petition to *intervene* with PERC.

Recognition may not be granted if within the ten day period another union either notifies the public employer of a claim to represent any employees involved in the unit or files a certification petition with PERC. If the public employer refuses to grant recognition, the public employer may file a petition for *certification* with PERC, or the public employer may inform the union that recognition will not be granted, and if the union still desires to seek exclusive representative status, then the union must file a petition for *certification* with PERC.

B. CERTIFICATION

A petition for *certification* of an employee representative may be filed by the public employer, any public

employee, any group of public employees, any individual, or any employee organization claiming to be the majority representative of public employees in an appropriate unit. All petitions must be in writing and should be filed with PERC.

All petitions for certification must contain the following items:

a. Name, address, telephone number of the public employer and the person to contact, including his title if known;

b. description of the unit including the approximate number of employees and their general job classifications;

c. date of the request for recognition and the date such request was declined, or a statement that no reply has been received;

d. name, address and telephone number of any existing recognized or certified exclusive representative, and the date of such certification or recognition;

e. the expiration date of any applicable contract, if known;

f. names, addresses and telephone numbers of any other employee organizations known to be interested in representing employees of that unit;

g. name, telephone number, signature, title and affiliation with any employee organization, if any, of the person filing the petition for certification;

h. any other relevant facts.

In addition to the above requirements, petitions for certification filed by employee representatives must be accompanied by a sufficient *showing of interest*. A sufficient showing of interest requires not less than 30 percent of the employees in the unit alleged to be appropriate. A typewritten alphabetical listing of the employees designating the employee representative must also be submitted to PERC when the petition for certification is filed by an employee representative. PERC will not furnish the showing of interest and the alphabetical list to any other party involved. Final determination as to the sufficiency of the showing of interest will be made by PERC. Petitions for certification filed by a public employer must also state that a claim for representation has been made by one or more public employees, groups of public em-

ployees, individuals or unions and that the public employer believes that it is possible that the union does not represent a majority of employees (commonly called a "good faith doubt"). Petitions for certification filed by the public employer do not involve any showing of interest as is required when an employee representative files a certification petition.

One original and four copies of all petitions must be filed with PERC. There is no requirement that a copy of any petition filed be sent to the other parties by the person filing, since PERC will forward a copy of the petition to all parties listed in the petition.

When PERC receives any petition for certification, it will conduct an investigation to determine the facts. This investigation is usually conducted by mail or by telephone. Sometimes, the agency will conduct an informal hearing between the employee representatives involved and the public employer. At this time, the public employer must furnish PERC a list of any other unions who have claimed, within the last 12 months, to represent any employees who are included in the unit. This list must contain the names, addresses and telephone numbers of those unions. PERC will also give the employer notices to post indicating that a petition has been filed so that employees will understand what is happening.

As a result of its investigation, PERC will determine whether or not a valid *question concerning representation* of employees exists and whether, at first glance, the proposed unit is appropriate. If the agency decides that there is no valid question concerning employee representation existing at that time, it may request the person who filed the petition to withdraw it. If that person does not withdraw the petition, PERC is empowered to dismiss the petition. PERC could find that there is no valid question regarding representation of employees for various reasons. The most common reason is a lack of sufficient showing of interest by the employee representative. This would result in a refusal by PERC to conduct an election and a dismissal of the petition.

At this point in the representation proceeding, PERC will determine whether another *investigation* or *hearing* is appropriate. The parties may agree on the appropriate

unit, where and when the election should be scheduled and who is eligible to vote. If they do, they will probably sign a consent election agreement. If this agreement is signed (and no other union objects) PERC can then hold the election without further investigation. If a hearing is determined to be appropriate, PERC will send a notice to the parties. This notice will state the time, place and nature of the hearing. It will also state the names of the parties involved, the unit claimed to be appropriate, and the position each party has taken. This hearing is supposed to be an investigatory rather than an adversary proceeding.

PERC might also determine under the particular circumstances that an administrative investigation is more appropriate than a hearing. In that case, the parties will still be permitted to submit documentary and other evidence. The parties will also be permitted to submit statements of their positions on the matters and allegations contained in the petition.

After conducting this investigation, PERC has discretion with respect to what action it will take. It may request the party filing the petition to withdraw it. If the party does not comply, the agency may issue a decision dismissing the petition, possibly without giving the party who filed the petition a chance to withdraw it first. PERC will take these steps only when it appears to it that there is no reasonable cause to believe that a valid *question concerning representation* in an appropriate unit exists. Alternatively, PERC may issue an order directing an election in the appropriate unit. For the agency to issue an order directing an election, it must appear to it that a valid question concerning representation does exist, that an election will reflect the free choice of the employees in the unit, and that the policies of the Act will be furthered.

6. WHAT IS THE REPRESENTATION ELECTION?

The representation election is the procedure through which PERC attempts to assure that the true and uncoerced desires of a majority of employees in the unit are determined with respect to who shall represent them.

It is of interest to note that on several occasions in which there were two competing employee representatives from which to choose, the organization that had the largest number of actual *members* before the election, nevertheless, lost the election. This has occurred even when the larger organization includes more than a majority of the employees in the unit within its membership. Because of this occasional result, mere membership lists are generally insufficient to dispel the "good faith doubt" of the public employer as to the majority representative status of an employee representative who is seeking recognition.

If all parties involved in the representation election stipulate that a secret ballot election should be conducted by PERC, it will proceed with the election. A proceeding under this set of circumstances is termed a *consent election*. For a consent election to be conducted, the parties must agree on the composition of the unit, the eligibility period for participation in the election, the representatives to be included on the ballot, and the dates, hours and location of the election. The conduct of the election is the same no matter which situation has created the need for it. The election will be conducted by PERC staff personnel or by neutrals which PERC hires for that election.

The public employer has an obligation, unless directed otherwise by PERC, to file an eligibility list with PERC. This list must be received by the agency at least ten days prior to the election date. It must contain an alphabetical listing of eligible voters along with their mailing addresses and job titles. PERC will make this list available to all parties to the representation proceeding.

PERC will, again, furnish notices of the election which the public employer must post. These notices will contain the following items: The details and procedures of the election; a description of what employees are contained in the unit involved; an explanation of when and for how long an employee must have been employed to be eligible to vote; an explanation of which, if any, terminated employees would be permitted to vote in the election; the dates, hours and location of the election; and a sample ballot.

All elections will be by secret ballot. Any party may have observers at each polling place. Any party may challenge the eligibility of any individual to vote in the election, and if the challenge appears to be for "good cause" the personnel conducting the election will permit the individual to vote but will impound and keep separate his ballot.

Upon the conclusion of the election, each party will be furnished with a tally of the ballots cast, excluding all challenged ballots. Each party then has five days to file objections to the conduct of the election.[2]

If there are objections to the conduct of the election, or if the challenged ballots are sufficient to affect the outcome of the election, PERC will conduct an investigation. Each party is permitted to submit evidence and statements of position on both the challenges and the objections. If PERC determines that a hearing would be appropriate under the circumstances, it can order that one be held. Whether a hearing is held or merely an administrative investigation is conducted, the objecting or challenging party has the obligation to submit evidence sufficient to uphold his objection or challenge.

Upon the conclusion of the administrative investigation or the hearing, or if no objections have been filed and the number of challenged ballots are insufficient to affect the outcome of the election, PERC will certify the election results to the parties.

7. WHAT IS DECERTIFICATION?

Where an existing employee representative has previously been *recognized* or *certified* as the majority representative a petition for *decertification* may be filed by any employee, group of employees, or any individual acting on the behalf of an employee or group of employees. The decertification petition must allege that the recognized or certified employee representative continues to claim to represent but no longer represents the majority of the employees in the unit.

[2] An original and four copies of all objections must be filed. The objections should contain a short statement of the reasons for each objection. The objecting party must also serve copies of the objections on all other parties.

Note that a public employer is not entitled to file a petition for decertification. When the employee representative has previously been recognized by the public employer, but not certified by PERC, and if the public employer has a "good faith doubt" with respect to whether or not the employee representative continues to represent a majority of the employees in the unit, the public employer can obtain the same result of seeking an election by filing a petition for certification. However, if the employee representative has previously been certified by PERC as the majority representative, the public employer cannot request a new certification or decertification election.

Petitions for decertification of an employee representative must contain the following:

a. a statement that the certified or recognized employee representative no longer represents a majority of the employees in the unit, but continues to claim to do so;

b. all the information required to be included in a petition for certification, see section 5, above;

c. a "showing of interest" of at least 30 percent of the employees in the unit, indicating that they no longer desire to be represented for the purpose of collective negotiations by the employee representative recognized or certified as the majority representative.

PERC is authorized to conduct the same investigations pursuant to the decertification petition that it conducts pursuant to a certification petition. Elections are conducted in the same manner as described earlier.

8. WHAT IS UNIT CLARIFICATION?

A petition for clarification of the unit may be filed either when one party desires to determine whether a specific job classification belongs in the unit or when one party is presently seeking to have certain employees removed from an existing unit. When either the public employer or the majority representative desires a change in the negotiating unit, it may file a petition with PERC seeking clarification of the unit. Only the public employer or the majority representative is permitted to file a petition for clarification of the negotiating unit.

9. WHAT IS INTERVENTION?

Generally, whenever questions involving the representation of employees arise between an employee representative and a public employer, other unions are permitted to *intervene* if they can submit either a *showing of interest* of at least 10 percent of the employees in the unit or a current or recently expired agreement covering any of the employees in the unit.

The second union must file a motion to intervene. Motions to intervene must be filed prior to the opening of the hearing conducted by PERC; prior to the issuance of a decision by PERC with respect to any representation petition; or, prior to the execution of an agreement for a consent election by the parties to the original employee representation question.

10. WHEN MAY REPRESENTATION PETITIONS BE FILED?

When a majority representative has been certified by PERC through an election, or where the majority representative has been granted *recognition* by the public employer, the majority representative is granted certain protection and privileges. When an employee representative has been properly certified or recognized, petitions filed within 12 months of the certification or recognition date will not be considered timely and will not be processed by PERC. Additionally, when any written agreement concerning substantive terms and conditions of employment is in existence, petitions for certification or decertification of an employee representative will not normally be considered timely unless filed within certain time periods. When the public employer is a school district, such petitions must be filed during the 45 day period between September 1 and October 15 in the last 12 months of such agreement. *Timeliness* protections vary with the types of public employers involved.

If there has been a valid election within the preceding 12 months, involving the requested negotiating unit or any subdivision of the requested negotiating unit, then

petitions for certification will not be considered timely and will not be processed by PERC.

Chapter VI

INJUNCTIVE RELIEF

1. BACKGROUND

For many years, parties who had cases before agencies of government could request that the agency ask a court to issue a *temporary restraining order* while their case was being decided. That order, commonly called an *injunction*, would stop one party from doing something which generally could not be undone later. For example, an individual claiming to own a building about to be torn down by someone else might ask that a court issue an injunction against destroying the building until it could be determined who actually owned it.

PERC has decided that it may issue temporary restraining orders and has done so in several cases arising under Chapter 123.

2. UNFAIR PRACTICE CASES

WHEN WILL PERC ISSUE AN INJUNCTION?

In a number of cases, PERC has set a standard for the issuance of injunctions.[1] First, it must be shown that the normal order which PERC issues, after finding that an unfair practice has occurred, would not be sufficient to correct the violation of law. In one case in which PERC has already issued an injunction, the union claimed that the public employer (a municipality) was about to subcontract out all the work performed by bargaining unit

[1] In re Township of Little Egg Harbor, PERC No. 94.
In re State of New Jersey (Stockton State College), PERC No. 76.

members.[2] The employees' union had just been certified as the majority representative and had not had an opportunity to bargain with the employer. PERC ordered the employer not to sub-contract while the charge was being processed in order to preserve the bargaining unit. PERC reasoned that if the union had to wait until a final decision on whether the employer had violated the law, there might not even be a bargaining unit left.

The second standard involves a determination by PERC that the charging party's chances of proving a violation of law are "substantial." This standard makes it additionally difficult for a charging party to receive an injunction while its charge is being processed by PERC.

Thus far, PERC has denied injunctions in a number of cases using the above standards. In one case, PERC refused to order a board of education to halt the assignment of cafeteria supervision to teachers. The union had claimed that the board violated the law when it made the assignment without bargaining first. The union asked that the injunction be issued while the unfair practice charge was being heard. While the oral decision in this case contained no reasons for denial, it can be assumed that the union failed to show that a later PERC order would not correct the alleged violation of law (that order could require the board, for example, to pay each teacher an additional amount of money for the time spent supervising the cafeteria). Because it is unclear whether the board, in fact, had violated the law, the injunction was probably also denied because the union could not prove that its chance of success with the charge was "substantial."

It is apparent that PERC will issue very few temporary restraining orders under these standards. This seems to be understood by the parties. As the current Chairman of PERC has noted in a recent paper, "in perhaps as many as half of the cases, the charging party has requested interim relief (an injunction) knowing that the request will not be granted but as a means of receiving

[2] In re Township of Stafford, PERC No. 76-9.

almost immediate attention and action regarding the handling of the charge."[3]

3. "SCOPE" CASES

PERC has also issued injunctions in scope of negotiations cases. On occasion, scope petitions are filed when a union seeks arbitration over a matter which the employer contends is not negotiable. In these cases, the employer can request that PERC issue an injunction delaying the arbitration hearing until it can make a decision on whether the matter is negotiable and, therefore, arbitrable.

As with unfair practice cases, PERC has established a standard for issuing injunctions in scope cases. PERC will issue such an injunction against arbitration if it determines that "there is any reasonable basis for the contention of the requested party that the matter(s) in dispute may be found not to be within the scope of collective negotiations and, therefore, not arbitrable."[4]

Under this standard, if the disputed matters are clearly negotiable (terms and conditions of employment), PERC will probably deny the injunction.

4. INJUNCTIVE RELIEF PROCEDURES[5]

HOW IS A REQUEST FOR AN INJUNCTION MADE?

The charging party (in an unfair practice case) or either of the parties in a scope case (almost always the employer) can request an injunction at the time the charge or petition is filed or at any other point after the filing.[6]

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[3] "Interim Relief in New Jersey," by Jeffery Tener, prepared for the Third Annual Meeting of the Society of Professionals in Dispute Resolution, Los Angeles, California, October 13, 1975, p. 23.

[4] **The Board of Education of the City of Englewood**, PERC No. 93, p. 4.

[5] The procedures used for unfair practice and scope cases have not differed.

[6] Because it is generally expected that certain papers will be filed with the request, it is suggested that you consult your attorney on this matter.

HOW IS THE DECISION MADE TO ISSUE AN INJUNCTION?

The parties are provided with an opportunity to appear before a representative of the Commission to argue their respective positions. Sometimes, the PERC representative will orally decide. On other occasions, a written decision will be issued. The decision may be appealed to the Appellate Division of New Jersey's Superior Court.

Appendix

THE EMPLOYER-EMPLOYEE RELATIONS ACT

NEW JERSEY

EMPLOYER-EMPLOYEE RELATIONS ACT

As Last Amended by C. 123, P.L. 1974 on October 21, 1974
Effective January 20, 1975

New Jersey Statutes Annotated
Title 34, Sections 34:13A-1 to 34:13A-13

Published By:

New Jersey School Boards Association
Department of Labor Relations

34:13A-1
Short Title.

This Act shall be known and may be cited as the "New Jersey Employer-Employee Relations Act."

34:13A-2
Declaration of Policy.

It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes, both in the private and public sectors; that strikes, lockouts, work stoppages and other forms of employer and employee strife, regardless where the merits of the controversy lie, are forces productive ultimately of economic and public waste; that the interests and rights of the consumers and the people of the State, while not direct parties therein, should always be considered, respected and protected; and that the voluntary mediation of such public and private employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent, public and private employer-employee peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this Act is hereby declared as a matter of legislative determination.

34:13A-3
Definitions.

When used in this Act:

(b) The term "commission" shall mean New Jersey Public Employment Relations Commission.

(c) The term "employer" includes an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification, but a labor organization, or any officer or agent thereof, shall be considered an employer only with respect to individuals employed by such organization. This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

(d) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in

connection with any current labor dispute or because of any unfair practice and who has not obtained any other regular and substantially equivalent employment. This term, however, shall not include any individual taking the place of any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the employer, or employed by any company owning or operating a railroad or railway express subject to the provisions of the Railway Labor Act. This term shall include any public employee, i.e. any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.

(e) The term "representative" is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organizations serving as a representative need not be limited in membership to the employees of, the employer whose employees are represented. This term shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them.

(f) "Managerial executives" of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

(g) "Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

34:13A-5.1
Establishment of Division of Public Employment Relations and Division of Private Employment Dispute Settlement.

There is hereby established a Division of Public Employment Relations and a Division of Private Employment Dispute Settlement.

(a) The Division of Public Employment Relations shall be concerned exclusively with matters of public employment related to determining negotiating units, elections, certifications and settlement of public employee representative and public employer disputes and grievance procedures. For the purpose of complying with the provisions of Article V, Section VI, paragraph 1 of the New Jersey Constitution, the Division of Public Employment Relations is hereby allocated within the Department of Labor and Industry, and located in the city of Trenton, but notwithstanding said allocation, the office shall be independent of any supervision or control by the department or by any board or officer thereof.

represent the appropriate unit in collective negotiations; and provided further, that, except where established practice, prior agreement, or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership. The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this Act shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit. Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiations with the majority representative; and (c) a minority organization shall not present or process grievances. Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations. When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative or an organization of which he is a member and have such grievance adjusted.

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.

When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes. Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

34:13A-5.4
Prohibited Practices; Commission Proceedings.

a. Employers, their representatives or agents are prohibited from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

(2) Dominating or interfering with the formation, existence or

34:13A-5.2
Public Employment Relations Commission; Powers and Duties; Members; Terms; Compensation.

There is hereby established in the division of Public Employment Relations a commission to be known as the New Jersey Public Employment Relations Commission. This commission, in addition to the powers and duties granted by this Act, shall have in the public employment area the same powers and duties granted to the labor mediation board in sections 7 and 10 of chapter 100, P.L. 1941 and in sections 2 and 3 of chapter 32, P.L. 1945. This commission shall make policy and establish rules and regulations concerning employer-employee relations in public employment relating to dispute settlement, grievance procedures and administration including enforcement of statutory provisions concerning representative elections and related matters and to implement fully all the provisions of this Act. The commission shall consist of 7 members to be appointed by the Governor, by and with the advice and consent of the Senate. Of such members, 2 shall be representative of public employers, 2 shall be representative of public employee organizations and 3 shall be representative of the public including the appointee who is designated as chairman. Of the first appointees, 2 shall be appointed for 2 years, 2 for a term of 3 years and 3, including the chairman, for a term of 4 years. Their successors shall be appointed for terms of 3 years each and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant.

The members of the commission, other than the chairman, shall be compensated at the rate of $100.00 for each 6 hour day spent in attendance at meetings and consultations and shall be reimbursed for necessary expenses in connection with the discharge of their duties except that no commission member who receives a salary or other form of compensation as a representative of any employer or employee group, organization or association, shall be compensated by the commission for any deliberations directly involving members of said employer or employee group, organization or association. Compensation for more, or less than, 6 hours per day, shall be prorated in proportion to the time involved.

The chairman of the commission shall be its chief executive officer and administrator, shall devote his full time to the performance of his duties as chairman of the Public Employment Relations Commission and shall receive such compensation as shall be provided by law.

The term of the member of the commission who is designated as chairman on the date of enactment of this Act shall expire on the effective date of this Act.

34:13A-5.3

Employee Organizations; Right to Form or Join; Collective Negotiations.

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees, except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to

administration of any employee organization.

(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.

(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

(7) Violating any of the rules and regulations established by the commission.

b. Employee organizations, their representatives or agents are prohibited from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances.

(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

(5) Violating any of the rules and regulations established by the commission.

c. The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charge and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the date he was no longer so prevented.

In any such proceeding, the provisions of the Administrative Procedure Act P.L. 1968, C. 410 (C. 52:14B-1 et seq.) shall be applicable. Evidence shall be taken at the hearing and filed with the commission. If, upon all the evidence taken, the commission shall determine that any party charged has engaged or is engaging in any such unfair practice, the commission shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this Act. All cases in which a complaint and notice of hearing on a charge is actually issued by the commission, shall be prosecuted before the commission or its agent, or both, by the representative of the employee organization or party filing the charge of his authorized representative.

d. The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.

e. The commission shall adopt such rules as may be required to regulate the conduct of representation elections, and to regulate the time of commencement of negotiations and of institution of impasse procedures so that there will be full opportunity for negotiations and the resolution of impasses prior to required budget submission dates.

f. The commission shall have the power to apply to the Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this Act, shall be affirmed and enforced in such proceeding.

34:13A-6
Powers and Duties.

(b) Whenever negotiations between a public employer and an exclusive representative concerning the terms and conditions of employment shall reach an impasse, the commission, through the Division of Public Employment Relations shall, upon the request of either party, take such steps as it may deem expedient to effect a voluntary resolution of the impasse. In the event of a failure to resolve the impasse by mediation the Division of Public Employment Relations is empowered to recommend or invoke factfinding with recommendation for settlement, the cost of which shall be borne by the commission.

(c) The board in private employment through the Division of Private Employment Dispute Settlement, and the commission in public employment, through the Division of Public Employment Relations, shall take the following steps to avoid or terminate labor disputes: (1) to arrange for, hold, adjourn or reconvene a conference or conferences between the disputants of one or more of their representatives or any of them; (2) to invite the disputants or their representatives or any of them to attend such conference and submit, either orally or in writing, the grievances of and differences between the disputants; (3) to discuss such grievances and differences with the disputants and their representatives; and (4) to assist in negotiating and drafting agreements for the adjustment in settlement of such grievances and differences and for the termination or avoidance, as the case may be, of the existing or threatened labor dispute.

(d) The commission, through the Division of Public Employment Relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees. The division

shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors, (2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit, or, (3) both craft and noncraft employees unless a majority of such craft employees vote for inclusion in such unit. All of the powers and duties conferred or imposed upon the division that are necessary for the administration of this subdivision, and non inconsistent with it, are to that extent hereby made applicable. Should formal hearings be required, in the opinion of said division to determine the appropriate unit, it shall have the power to issue subpoenas as described below, and shall determine the rules and regulations for the conduct of such hearing or hearings.

(e) For the purposes of this section the Division of Public Employment Relations shall have the authority and power to hold hearings, subpoena witnesses, compel their attendance, administer oaths, take the testimony or deposition of any person under oath, and in connection therewith, to issue subpoenas duces tecum, and to require the production and examination of any governmental or other books or papers relating to any matter described above.

(f) .....In carrying out of any of its work under this Act, the commission may designate one of its members or an officer of the commission to act on its behalf and may delegate to such designee one or more of its duties hereunder and, for such purpose, such designee shall have all of the powers hereby conferred upon the commission in connection with the discharge of the duty or duties so delegated.

(g) The board and commission may also appoint and designate other persons or groups of persons to act for and on its behalf and may delegate to such persons or groups of persons any and all of the powers conferred upon it by this Act so far as it is reasonably necessary to effectuate the purposes of this Act. Such persons shall serve without compensation but shall be reimbursed for any necessary expenses.

(h) The personnel of the Division of Public Employment Relations shall include only individuals familiar with the field of public employee-management relations. The commission's determination that a person is familiar in this field shall not be reviewable by any other body.

34:13A-7
Arbitration

Whenever a controversy shall arise between an employer and his employees which is not settled either in conference between representatives of the parties or through mediation in the manner provided by this Act, such controversy may, by agreement of the parties, be submitted to arbitration, one person to be selected by the employer, one person to be selected by the employees, and a third selected by the representatives of the employer and employees, and in the event of any such appointment or selection not being made upon the request of the parties in the controversy, the department may select the third person to arbitrate the matter submitted; provided, however, that the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of the policy or purpose of this Act, or of any provision thereof, nor shall failure or refusal to arbitrate constitute a basis for any action of law or suit in equity.

34:13A-8.1
Effect of Act Upon Prior Agreements.

Nothing in this Act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current terms heretofore entered into between any public employer and any employee organization nor shall any provision hereof annul or modify any pension statute or statutes of this State.

34:13A-8.2
Filed Contracts In Public Employment.

The commission shall collect and maintain a current file of filed contracts in public employment. Public employers shall file with the commission a copy of any contracts it has negotiated with public employee representatives following the consummation of negotiations.

34:13A-8.3
Development and Maintenance of Programs.

The commission in conjunction with the Institute of Management and Labor Relations of Rutgers, the State University, shall develop and maintain a program for the guidance of public employees and public employers in employee-management relations, to provide technical advice to public employees and public employers on employee-management programs, to assist in the development of programs for training employee and management personnel in the principles and procedures of consultation, negotiation and settlement of disputes in the public service, and for the training of employee and management officials in the discharge of their employee-management relations responsibilities in the public interest.

34:13A-11
Rules.

The board shall have power to adopt, alter, amend or repeal such rules in connection with the voluntary mediation of labor disputes in private employment and the commission shall have the same powers in public employment, as may be necessary for the proper administration and enforcement of the provisions of this Act.

34:13A-12
Construction.

Nothing contained in this Act shall be construed as interfering with, impeding or diminishing in any way any right guaranteed by law or by the Constitution of the State or of the United States.

34:13A-13
Separability of Provisions.

If any clause, sentence, paragraph or part of this Act, or the application thereof to any person or circumstances, shall for any reason be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, and the application of such provisions to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this Act would have been adopted had such invalid provisions not been included herein.

JULY 1, 1976

Effective July 1, 1976, the New Jersey Employer-Employee Relations Act has been amended to read as follows:

"Notwithstanding the provisions of P.L. 1974, C. 123, the cost of factfinding shall be borne equally by the public employer and the exclusive employee representative."

(No Statutory assignment number has been given thus far.)

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